

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICKIE RUTH HELMS

Claimant

VS.

TOLLIE FREIGHTWAYS, INC.

Respondent

AND

INSURANCE COMPANY OF NORTH AMERICA

Insurance Carrier

AND

TRUCK INSURANCE EXCHANGE

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 152,668

ORDER

ON the 6th day of January, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler, dated December 8, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Louis S. Wexler, of Overland Park, Kansas. Respondent and its insurance carrier, Insurance Company of North America appeared by its attorney, Marcia Yates Gearheart, of Kansas City, Missouri. Truck Insurance Exchange, appeared by its attorney, Kip A. Kubin, of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Robert L. Kennedy, of Kansas City, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The respondent and Insurance Company of North America have requested a review of the Award of Administrative Law Judge Robert H. Foerschler dated December 8, 1993. In his Award, the Administrative Law Judge found respondent and Insurance Company of North America liable to claimant for an 18 percent (18%) work disability. The issues presented to the Appeals Board for review were:

- (1) Whether claimant sustained a compensable injury on January 25, 1991, arising out of and in the course of her employment with respondent.
- (2) If the incident of January 25, 1991 is compensable, which insurance carrier is responsible?
- (3) Average weekly wage.
- (4) Nature and extent of claimant's disability.
- (5) The liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) Claimant sustained a compensable injury under the Kansas Workers Compensation Act on January 25, 1991.

On January 25, 1991, claimant sustained injury to her neck and back when her pickup was struck from behind by another vehicle. At the time of the accident, claimant was driving home from physical therapy. This accident is compensable as the physical therapy claimant was receiving was directly related to a previous work related accident she had sustained while working for respondent on February 25, 1988. This issue was decided by the Kansas Supreme Court in Taylor v. Centex Construction Co., 191 Kan. 130, 379 P.2d 217 (1963). In the Taylor case, the Court found that an accidental injury which occurs while an employee is returning from a medical appointment pertaining to a work injury arises out of the nature, conditions, obligations and incidents of employment as one of the primary duties under the Workers Compensation Act is to furnish medical treatment reasonably necessary to cure and relieve the worker from the effect of injury.

- (2) Truck Insurance Exchange is the insurance carrier that is responsible for the payment of benefits to claimant for this work related injury.

The accident of January 25, 1991, is directly related and arises from claimant's wrist injury of February 1988. In February 1988, Truck Insurance Exchange was respondent's insurance carrier. In December 1991, claimant, respondent, and Truck Insurance Exchange settled the wrist injury claim, but left open claimant's right to pursue benefits arising from the January 1991 accident.

The situation at hand is similar to those where medical malpractice adds to an injured worker's impairment or results in a new and distinct injury. The Kansas Supreme Court held in Roberts v. Krupka, 246 Kan. 433, 442; 790 P.2d 422 (1990), that any

aggravation or additional injury arising from medical malpractice in the treatment of an injury compensable under the Workers Compensation Act is a consequence of the primary injury and also compensable under the Act. At page 441 of the opinion, the Court notes that the on-the-job injury was the cause of the employee being exposed to the risk of malpractice. Similarly, it was claimant's February 1988 work related injury that exposed her to the risks of travel to and from her therapy treatments.

As the accident of January 25, 1991, is a direct consequence of the primary injury of February 1988, the insurance carrier on the coverage at the time of the primary injury, Truck Insurance Exchange, is the responsible carrier in this proceeding. To hold otherwise could result in holding a carrier liable for payment of benefits to a worker for which it has not received premiums.

(3) The average weekly wage is \$317.83 as determined by the Administrative Law Judge using the only information that he had available. Although the wage information pertains to a period after the date of accident of the wrist injury, it appears to fairly reflect the wage claimant was earning on that date.

(4) Claimant is entitled to receive permanent partial general disability benefits based upon an 18 percent (18%) work disability. The Kansas Supreme Court held in Hughes v. Inland Container Corp., 247 Kan. 407, 422; 799 P.2d 1011 (1990), that the test for determining permanent partial general disability is the extent to which the ability of the employee to perform work in the open labor market and the ability to earn comparable wages have been reduced considering the worker's education, training, experience, and capacity for rehabilitation. In Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Kansas Court of Appeals held that K.S.A. 44-510e(a) required consideration of the loss of access to the open labor market and loss of ability to earn comparable wages, but clearly left it up to the finder of fact to determine how much weight to give each factor.

The Appeals Board finds the claimant has experienced an approximate 18 percent (18%) loss of ability to earn comparable wages as a result of her work related accident. This finding is based upon claimant's pre-injury earnings of \$317.83 per week and her current wage of \$6.50 per hour, or \$260.00 per week. The difference between claimant's pre-injury and post-injury wage is 18 percent (18%).

Insufficient evidence has been presented to state, with any degree of certainty, the percentage of claimant's loss of access to the open labor market. However, based upon the restrictions and limitations placed upon claimant for the low back injury sustained in January 1991, a significant portion of the labor market has been lost. Orthopedic surgeon David L. Tillema, M.D., evaluated claimant and found that she had experienced a 5-10 percent (5-10%) impairment due to the lumbar injury and should avoid work requiring heavy lifting, bending and stooping. Dr. Tillema would not place specific lifting restrictions upon claimant without a functional capacity evaluation. Orthopedic surgeon Satish C. Bansal, M.D., testified that he evaluated claimant on April 16, 1992 and that claimant had sustained musculoskeletal and ligamentous strain of the lumbar spine which resulted in a 10 percent (10%) impairment of function to the body as a whole. Dr. Bansal believes claimant should observe restrictions of no lifting greater than 25 pounds and avoid bending and stooping.

After considering claimant's wage loss and permanent work restrictions, the Appeals

Board finds claimant has sustained an 18 percent (18%) work disability as a result of her January 1991 accident for which she is entitled permanent partial general disability benefits.

Both insurance carriers argue that claimant's work disability should be less than 18 percent (18%) since she had previously experienced a serious injury to her wrist for which she had received numerous surgeries. The evidence presented fails to establish that claimant's previous injury caused her to lose access to the open labor market or affected her ability to earn comparable wages. Claimant testified that her hand surgeon, Dr. Harris, had advised her that she could return to over-the-road driving if she had not injured her back. Further, there is no credit as the evidence fails to establish a contribution between the wrist and back injuries, and there are no weeks of overlapping permanent partial disability benefits.

(5) The Kansas Workers Compensation Fund has no liability in this proceeding.

In order to be relieved of liability for compensation awarded or be entitled to an apportionment of the cost thereof, the respondent must show that the injury or disability ultimately sustained would not have occurred but for the preexisting physical or mental impairment of the employee, or that the resulting disability was contributed to by the preexisting impairment. See K.S.A. 44-567.

The Appeals Board finds that claimant's preexisting wrist injury had no bearing on the injury claimant received to her neck and low back in the vehicle accident of January 25, 1991. Further, the evidence fails to establish that claimant's resulting disability was in any way contributed to by preexisting impairment. Therefore, the Fund is absolved of liability in this proceeding.

AWARD

WHEREFORE, the Award of Administrative Law Judge Robert H. Foerschler dated December 8, 1993 is affirmed except with respect to the insurance carrier responsible for payment of benefits and costs of this proceeding.

WHEREFORE, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Vickie Ruth Helms, and against the respondent, Tollie Freightways, Inc., and the insurance carrier, Truck Insurance Exchange, for an accidental injury sustained on January 25, 1991.

The claimant is entitled to 43.14 weeks temporary total disability at the rate of \$211.90 per week or \$9,141.37 followed by 371.86 weeks of permanent partial disability at the rate of \$38.14 per week or \$14,182.74 for an 18 percent (18%) permanent partial general bodily disability making a total award of \$23,324.11. As of December 9, 1993 there would be due and owing to the claimant 43.14 weeks temporary total compensation at the rate of \$211.90 per week in the sum of \$9,141.37 plus 106.86 weeks permanent partial compensation at the rate of \$38.14 per week in the sum of \$4,075.64 for a total due and owing of \$13,217.01 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$10,107.10 shall be paid at \$38.14 per week for 265 weeks or until further order of the Director.

Truck Insurance Exchange is ordered to reimburse the insurance carrier, Insurance Carrier of North America for all medical expense, temporary total disability benefits,

permanent partial disability benefits, transcription fees and other allowable costs it has incurred and paid in connection with this proceeding.

Future medical treatment for the claimant for injuries compensated in this proceeding may be awarded upon proper application and a hearing upon notice to all parties.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Costs of transcripts in the record are taxed against the respondent as follows:

GENE DOLGINOFF ASSOCIATES, LTD.	\$ 956.95
HOSTETLER & ASSOCIATES, INC.	\$ 272.75
METROPOLITAN COURT REPORTERS, INC.	\$ 858.35

IT IS SO ORDERED.

Dated this ____ day of February, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Louis S. Wexler, 7201 Metcalf, Overland Park, Kansas 66204
Marcia Yates Gearheart, 120 W 12th, Suite 310, Kansas City, Missouri 64105
Kip A. Kubin, PO Box 25625, Overland Park, Kansas 66225-5625
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director